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SHARIL AB SAMAD v. TOMMY THOMAS K THOMAS & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ROZ MAWAR ROZAIN JC
[CIVIL SUIT NO: WA-21NCvC-86-12-2023]
3 JULY 2024

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Abstract – *The Attorney General is not immune from civil liability for malicious prosecution and misfeasance in public office, even though he enjoys wide discretionary powers to institute, conduct, or discontinue criminal proceedings; these powers are not absolute and may be subject to judicial review in cases of bad faith or malice.*

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CONSTITUTIONAL LAW: *Attorney General – Powers and prerogative – Immunity – Legal accountability – Claimant charged at Sessions Court pursuant to s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Failure to declare monies received as income – Incomplete investigation – Prosecution withdrew charge against claimant – Claimant acquitted and discharged – Whether civil claim of malicious prosecution and misfeasance in public office could be maintained against Attorney General – Whether Attorney General immune from civil claims – Whether Attorney General's exercise of prosecutorial discretion could be reviewed – Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors – Federal Constitution, art. 145(3)*

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TORT: *Malicious prosecution – Claim against Attorney General – Claimant charged at Sessions Court pursuant to s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Failure to declare monies received as income – Incomplete investigation – Prosecution withdrew charge against claimant – Claimant acquitted and discharged – Whether civil claim could be maintained against Attorney General – Whether claimant pleaded sufficient particulars of malicious prosecution to establish reasonable cause of action*

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TORT: *Misfeasance in public office – Claim against Attorney General – Claimant charged at Sessions Court pursuant to s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Failure to declare monies received as income – Incomplete investigation – Prosecution withdrew charge against claimant – Claimant acquitted and discharged – Whether civil claim could be maintained against Attorney General – Whether claimant pleaded sufficient particulars of misfeasance in public office to establish reasonable cause of action*

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CIVIL PROCEDURE: *Striking out – Application for – Claimant charged at Sessions Court pursuant to s. 4(1) of Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 – Failure to declare monies received as income – Incomplete investigation – Prosecution withdrew charge against claimant – Claimant acquitted and discharged – Claim premised on malicious prosecution and misfeasance in public office against Attorney General – Application by Attorney General to strike out claim – Whether claim disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was abuse of court process – Whether unsustainable by law – Whether claim ought to be struck out – Whether there were conflicts of material evidence that rendered striking out inappropriate – Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c) & (d)*

The plaintiff, an active member of United Malays National Organisation ('UMNO'), held various political positions and was also a member of Parliament. In 2013, the plaintiff used his personal savings of over RM1 million to revive an abandoned low-cost housing project to help affected purchasers. The plaintiff met with the then UMNO President, Dato' Seri Mohd Najib Tun Abdul Razak ('Dato' Seri Najib Razak'), to seek financial assistance to recover his personal money used for the said project. Dato' Seri Najib Razak gave the plaintiff a cheque for RM1 million as reimbursement and to fund the continued revival. After Pakatan Harapan won the 14th General Election in 2018, the first defendant was appointed as the Attorney General ('AG'). Many UMNO politicians, including the plaintiff, were investigated by the Malaysian Anti-Corruption Commission ('MACC'). The MACC recorded the plaintiff's statement regarding the RM1 million which he received from Dato' Seri Najib Razak. The MACC officer lodged a report, alleging that the plaintiff was involved in money laundering by receiving RM1 million, which was linked to 1MDB funds. The MACC held a press conference, announcing that it had issued compound notices to 80 individuals and entities believed to have received funds linked to 1MDB, including the plaintiff. The plaintiff was later arrested by the MACC and charged at the Sessions Court, pursuant to s. 4(1) of the Anti-Money Laundering and Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, for failing to declare the RM1 million received from Dato' Seri Najib Razak as income. During trial, the prosecution's own witnesses revealed that the investigation papers were incomplete when the plaintiff was charged. After the prosecution's case, the prosecution informed the court that it was withdrawing the charge against the plaintiff. The plaintiff was acquitted and discharged. The plaintiff commenced a civil suit against the defendants, seeking, *inter alia*, declarations that the defendants jointly and/or severally conducted and were liable for the malicious investigation, wrongful arrest, malicious prosecution and misfeasance in public office against the plaintiff. In the present application, the first defendant sought to

strike out the plaintiff's suit, pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 ('ROC'), on the grounds that the plaintiff's claim disclosed no reasonable cause of action, was scandalous, frivolous or vexatious and was an abuse of court process or, otherwise, unsustainable by law. The issues that arose for consideration were: (i) whether a civil claim of malicious prosecution and misfeasance in public office could be maintained against the AG, in light of art. 145(3) of the Federal Constitution ('FC'); (ii) if such claims are maintainable, whether the plaintiff had pleaded sufficient particulars to establish a reasonable cause of action; and (iii) whether there were conflicts of material evidence that rendered a striking out inappropriate at this stage.

Held (dismissing first defendant's application):

(1) A key contention of the first defendant was that art. 145(3) of the FC, which provides the AG with discretionary powers to institute, conduct or discontinue criminal proceedings, immunised him from any civil claims arising from the exercise of that power. The first defendant further argued that the recent Federal Court decision in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors* ('*Sundra Rajoo*') only allowed judicial review of prosecutorial discretion in rare and exceptional circumstances and, was thus, the only recourse available to the plaintiff. However, *Sundra Rajoo* did not stand as authority that the AG's discretion could only be challenged by way of judicial review. The action in *Sundra Rajoo* sought to declare the charge proffered as nullity and thus, invoked the court's supervisory jurisdiction. In contrast, the present action for malicious prosecution did not seek to nullify the charge proffered but, rather, sought declarations and damages for the alleged abuse of prosecutorial power. Judicial review was therefore unnecessary and, in fact, impractical given that the charge had been conclusively disposed of in the plaintiff's favour. Moreover, *Sundra Rajoo* itself held that *mala fide* was one of the traditional grounds for judicial review of the AG's discretion. Given that malice was also central to the tort of malicious prosecution, it followed that, if prosecutorial discretion could be judicially reviewed on grounds of *mala fide*, a freestanding civil claim premised on malice should similarly be permissible. The first defendant's contention on absolute prosecutorial immunity drawn from common law was also unpersuasive. Even under English common law, courts have recognised the feasibility of malicious prosecution claims notwithstanding such immunity. Prosecutorial immunity could not be absolute and must yield in exceptional cases where prosecutorial power had been abused for improper motives. To hold otherwise would place the AG completely above the law. As such, claims for malicious prosecution and misfeasance in public office could

lie against the AG in appropriate cases and it was not a legal position contrary to art. 145(3) of the FC. While art. 145(3) of the FC confers wide discretion, it does not make the AG completely immune from judicial review. In appropriate cases, the courts can review the exercise of prosecutorial discretion on established grounds like illegality, irrationality and procedural impropriety. Significantly, the courts recognised bad faith or *mala fide* as one of the grounds for judicial review or prosecutorial discretion. The non-justiciability argument brought forth by the first defendant no longer presented an insurmountable hurdle. If prosecutorial discretion could be reviewed on grounds of bad faith, there was no reason, in principle, why a civil claim founded on malice could not be maintained. The law must provide a remedy where legal wrongs are committed, even by the highest legal officer. To hold otherwise would enshrine the most repugnant form of double standards. It would be a dereliction of judicial duty to summarily scuttle the claim without a trial. The allegations were grave and troubling enough that public confidence would be undermined if they were not properly investigated. Striking out would be an affront to the constitutional imperative of upholding the rule of law without fear or favour. (paras 9-13, 15-16 & 18)

(2) The essential elements for malicious prosecution had been properly particularised. The plaintiff had pleaded that: (i) the first defendant set the criminal law in motion against him by consenting to the charge; (ii) there was no reasonable or probable cause for the charge, that the first defendants was actuated by malice of improper purpose; (iii) the proceedings were terminated in the plaintiff's favour through an acquittal; and (iv) the plaintiff suffered damage to his reputation. While the first defendant argued that they were bare allegations, the plaintiff had, in fact, pleaded specific particulars, including the first defendant's (i) statements showing political bias in his autobiography titled 'My Story – Justice in the Wilderness'; (ii) supposed interference with the MACC investigations despite being informed there was no wrongdoing; (iii) failure to ensure complete investigation papers before charging and the startling revelations by prosecution witnesses during trial that demolished the basis for the charge. They were not mere assertions but detailed factual averments pleaded. Particulars pleaded for misfeasance were likewise sufficient. The tort of misfeasance, aimed at preventing abuse of public power, required establishing that a public officer acted with targeted malice or reckless indifference in abusing his power. The plaintiff's pleadings, particularising the first defendant's purported improper motives, deliberate failure to scrutinise the investigation and hasty decision to charge despite incomplete papers, amply established a

A reasonable cause of action for misfeasance in public office. Given that malice was the central thread connecting these causes of action, the various specific particulars pleaded by the plaintiff cumulatively raised a serious *prima facie* case of abuse of power warranting a trial. At the very least, they could not be said to be obviously unsustainable to justify
B a striking out at this stage. (paras 19, 20 & 22)

(3) Even if there was doubt about the adequacy of the pleadings, the present application must fail due to clear conflicts on material facts and evidence. A striking out application should not be allowed where there are factual conflicts that require a trial for determination. Here, the
C affidavit evidence revealed obvious conflicts on key issues like the first defendant's alleged pressuring of the MACC investigations, the incomplete state of the investigation papers and the plaintiff's information to the authorities that the RM1 million was a reimbursement. The first defendant had largely made bare denials
D without properly addressing or refuting the plaintiff's specific averments. The first defendant's published statements in his biography formed a crucial plank of the plaintiff's case theory. They provided the clearest link between the alleged malice and the overt act of prosecution. The fact that this evidence came from the first defendant's own pen
E made it impossible to ignore or summarily discount. Seen holistically, they reinforced the case for allowing the claim to be ventilated at a full trial where the first defendant would have the opportunity to explain those statements and be tested by cross-examination. Only then can the truth be ascertained in accordance with the time-honoured adversarial process that is the hallmark of our justice system. (paras 25 & 31)

F **(4)** The plaintiff's claim was not suitable for a striking out under any of the limbs of O. 18 r. 19(1) of the ROC. The claim was not obviously unsustainable, vexatious or an abuse of court process. The pleadings and affidavit evidence disclosed a reasonable cause of action plainly
G deserved to be tried. The facts and circumstances of how the plaintiff came to be charged and then acquitted were troubling and cried out for investigation. The evidence revealed unsettling suggestions of hasty and selective prosecution without proper basis. Public confidence in the administration of justice would be undermined if such serious averments were shut out without being ventilated through the curial process. The
H balance of justice and the wider public interest mandated that this case be allowed to proceed. (paras 32 & 34)

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Case(s) referred to:

Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors [2014] 9 CLJ 489 HC ***(refd)***

Elguzouli-Daf v. The Commissioner Of Police Of The Metropolice & Anor [1995] 1 All ER 833 ***(refd)***

Gouriet v. Union Of Post Office Workers [1977] 1 QB 729 ***(refd)***

Johnson Tan Han Seng v. PP & Other Appeals [1977] CLJU 38; [1977] 1 LNS 38 FC ***(refd)***

Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd [2017] 5 CLJ 418 FC ***(refd)***

Long Samat & Ors v. PP [1974] CLJU 80; [1974] 1 LNS 80 FC ***(refd)***

Mahan Singh Karam Singh v. Chanan Singh Sher Singh [1956] 1 WLR 781 ***(refd)***

Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal [2019] 4 CLJ 561 FC ***(refd)***

Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1978] CLJU 143; [1978] 1 LNS 143 FC ***(refd)***

Riches v. Director Of Public Prosecutions [1973] 2 All ER 935 ***(refd)***

Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors [2014] 9 CLJ 225 HC ***(refd)***

Sundra Rajoo Nadarajah v. Menteri Luar Negeri, Malaysia & Ors [2021] 6 CLJ 199 FC ***(dist)***

Legislation referred to:

Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, s. 4(1)

Federal Constitution, art. 145(3)

Rules of Court 2012, O. 18 r. 19(1)(a), (b), (c), (d)

For the plaintiff - Syed Faisal Al-Edros, Syahrul Syazwan Salehin, Woo J Enn, Firoz Hussein, Iqbal Harith Liang, Firdaus Danial & Harel Nieryan, PDK; T/n Fahri, Azzat & Co

For the 1st defendant - Alan Adrian Gomez, Merlyn Lai Wei Shiung, Haikaldin Mahyidin & Yap Xue You, PDK; T/n Tommy Thomas

For the 2nd defendant - Zetty Zurina Kamaruddin, Siti Syakimah, Siti Norashikin & Syafiq Affandy; SFCs

Reported by Najib Tamby

JUDGMENT
(encl. 13)

Roz Mawar Rozain JC:

Introduction

[1] With the filing of this suit by the plaintiff, this court is called upon to consider whether the first defendant, when he was the Attorney General, in exercising his vast powers under art. 145(3) of our Federal Constitution (FC), is wholly immune for legal accountability. The plaintiff's claim, which alleges grave abuse of that power through malicious prosecution and misfeasance, raises profound questions that strike at the very heart of our

A constitutional order. The answers this court gives will have far-reaching consequences, not just for the parties before it, but for the integrity and repute of our entire system of justice. Mindful of the weight of this responsibility, this court turned now to the issues at hand.

B **[2]** Through encl. 13, the first defendant applied to strike out the plaintiff's suit pursuant to O. 18 r. 19(1)(a), (b), (c) and (d) of the Rules of Court 2012 (RoC). The grounds advanced by the first defendant are that the plaintiff's claim disclosed no reasonable cause of action, is scandalous, frivolous or vexatious and is an abuse of the process of the court or is otherwise unsustainable by law. The main issues that arise for consideration
C are:

(i) whether a civil claim of malicious prosecution and misfeasance in public office can be maintained against the Attorney General in light of art. 145(3) of the FC?

D (ii) if such claims are maintainable, whether the plaintiff has pleaded sufficient particulars to establish a reasonable cause of action?

(iii) whether there are conflicts of material evidence that render a striking out inappropriate at this stage?

E **The Plaintiff's Claim**

[3] Based on the pleadings, the factual matrix of the plaintiff's claim for malicious prosecution can be summarised as follows:

(i) the plaintiff was an active member of UMNO and held various political positions from 1973 to 2023. He was also the Member of
F Parliament for Johor Bahru from 1978 to 1990 and 2004 to 2018, (paras. 9 to 11 of statement of claim (SoC));

(ii) in 2013, the plaintiff used his personal savings of over RM1,000,000 to revive an abandoned low-cost housing project called Puri
G Langkasuka in Larkin, Johor Bahru, to help the affected purchasers, (paras. 13 to 14 of SoC);

(iii) towards the end of 2013, the plaintiff met with the then UMNO President, Dato' Seri Najib Razak, to seek financial assistance to recover his personal money used for the revival and to fund the
H continued revival works. Dato' Seri Najib gave the plaintiff a cheque for RM1,000,000 as reimbursement and to fund the continued revival, (paras. 17 to 18 of SoC);

(iv) after Pakatan Harapan won the 14th General Election on 9 May 2018, the first defendant was appointed as Attorney General while the
I second defendant was appointed as Chief Commissioner of Malaysian Anti-Corruption Commission (MACC). Many UMNO politicians were then investigated by MACC, (paras. 19 to 21 of SoC);

(v) on 4 July 2019, MACC recorded the plaintiff's statement, where he explained that the RM1,000,000 received from Dato' Seri Najib was a reimbursement of his expenses for the Puri Langkasuka project, (para. 23 of SoC);

(vi) on 23 September 2019, MACC officer lodged a report alleging that the plaintiff was involved in money laundering by receiving RM1,000,000 linked to 1MDB funds, (para. 24 of SoC);

(vii) on 7 October 2019, MACC held a press conference announcing that it had issued compound notices to 80 individuals and entities believed to have received funds linked to 1MDB, including the plaintiff, to pay a fine of 2.5 times the amount received, (para. 26 of SoC);

(viii) on 20 January 2020, the plaintiff was arrested by MACC. On 21 January 2020, the plaintiff was charged in the Kuala Lumpur Sessions Court under s. 4(1) of the Anti-Money Laundering Act, Anti-Terrorism Financing and Proceeds of Unlawful Activities 2001 (AMLA) for failing to declare the RM1,000,000 received from Dato' Seri Najib as income, (paras. 30 to 31 of SoC);

(ix) during the trial at the High Court, the prosecution's own witnesses gave revelations, including:

(a) the investigation papers (IP) were incomplete when the plaintiff was charged;

(b) the investigating officer (IO) himself admitted the investigations were incomplete;

(c) the witness from the Inland Revenue Board of Malaysia (LHDN) stated that many steps were required to ascertain if the RM1,000,000 was the plaintiff's income but this was not done before charging the plaintiff, (paras. 34 to 35 of SoC);

(x) on 5 January 2023, after the prosecution's case, the Deputy Public Prosecutor informed the court that the prosecution was withdrawing the charge. The court then acquitted and discharged the plaintiff, (para. 38 of SoC).

[4] The reliefs sought by the plaintiff include declarations that the defendants jointly and/or severally conducted and are liable for the malicious investigation, wrongful arrest, malicious prosecution and misfeasance in public office against the plaintiff. Amongst the reliefs the plaintiff sought are compensation of RM10,000,000 for the plaintiff's mental torture and damage to reputation, or general damages to be assessed.

[5] If the proves successful at trial, his claims are also for aggravated and/or exemplary damages of RM10,000,000 or to be assessed. The plaintiff further sought for the defendants to mete unconditional apology in major newspapers, (para. 47 of SoC).

The Defences Raised

[6] The first defendant's defence essentially stated:

(i) the claim disclosed no cause of action against the first defendant as Attorney General who was exercising his prosecutorial discretion.

(ii) the first defendant was briefed by the investigators, personally read the investigation papers and was satisfied there was a good case to prosecute the plaintiff before deciding to charge him.

(iii) even after the first defendant resigned in February 2020, his successor as Attorney General continued with the prosecution until January 2023, showing the charge had merits.

(iv) the first defendant claims the suit is an abuse of process for ulterior purposes as he merely preferred the charge as Attorney General under the Pakatan Harapan Government.

[7] The second to the fourth defendants' defence pleaded as follows:

(i) the second defendant carried out her duties lawfully as a public officer.

(ii) all actions by the second to fourth defendants were lawful and there was no element of bad faith.

(iii) the unfettered prosecutorial discretion of the Attorney General and Public Prosecutor is non-justiciable.

[8] In summary, the plaintiff's claim is for malicious prosecution on the basis that he was wrongly investigated and charged when the investigations were incomplete. The defendants all disputed this and contended that they acted lawfully without malice or bad faith in investigating and prosecuting the plaintiff.

The Defendants' Striking Out Application Under O. 18 r. 19(1)(a), (b), (d) Of The RoC: Arguments And Assessment

Whether Claims Of Malicious Prosecution And Misfeasance Can Lie Against The Attorney General

[9] A key contention of the first defendant is that art. 145(3) of the FC, which provides the Attorney General discretionary power to institute, conduct or discontinue criminal proceedings, immunises him from any civil claims arising from the exercise of that power. It is argued that the recent Federal Court decision in *Sundra Rajoo Nadarajah v. Menteri Luar Negeri,*

Malaysia & Ors [2021] 6 CLJ 199; [2021] 5 MLJ 209 only allows judicial review of prosecutorial discretion in rare and exceptional circumstances, and is thus the only recourse available to the plaintiff. The following passage of the Federal Court's judgments was highlighted:

> *The AG/PP did not have absolute or unfettered discretion under art. 145(3) of the Federal Constitution to institute, conduct or discontinue any proceedings for a criminal offence. In appropriate, rare and exceptional cases, such discretion was amendable to judicial review. The evidence in the instant case led to no other conclusion but that the AG/PP knew or ought to have known that the appellant was covered by the scope of his functional immunity. Despite this, the AG/PP decided to charge the appellant. A clear and direct indication of this was the AG/PP's issuance of his consent to prosecute the appellant in spite of the letter from the Secretary-General of AALCO of even date indicating that the first and second respondents had separately requested for an ad hoc waiver of the appellant's immunity and those requests were denied (see para 112 & 122).*
>
> (emphasis added)

[10] However, upon careful analysis of *Sundra Rajoo* (*supra*), this court finds that it does not stand as authority that the Attorney General's discretion can only be challenged by way of judicial review. Firstly, the action in *Sundra Rajoo* (*supra*) sought to declare the charge proffered as a nullity, and thus invoked the court's supervisory jurisdiction. In contrast, the present action for malicious prosecution does not seek to nullify the charge proffered, but rather seeks declarations and damages for the alleged abuse of prosecutorial power. Judicial review is therefore unnecessary and in fact impractical given that the charge has been conclusively disposed of in the plaintiff's favour.

[11] Moreover, *Sundra Rajoo* itself held that *mala fide* is one of the traditional grounds for judicial review of the Attorney General's discretion. Given that malice is also central to the tort of malicious prosecution, it follows that if prosecutorial discretion can be judicially reviewed on the grounds of *mala fide*, a freestanding civil claim premised on malice should similarly be permissible.

[12] The first defendant's contention on absolute prosecutorial immunity drawn from the common law is also unpersuasive. Even under English common law, courts have recognised the feasibility of malicious prosecution claims notwithstanding such immunity (see *Riches v. Director Of Public Prosecutions* [1973] 2 All ER 935 and *Elguzouli-Daf v. The Commissioner Of Police Of The Metropolice & Anor* [1995] 1 All ER 833). More pertinently, the High Court in several local cases like *Rosli Dahlan v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 225; [2014] 11 MLJ 481 and *Dato' Pahlawan Ramli Yusuff v. Tan Sri Abdul Gani Patail & Ors* [2014] 9 CLJ 489; [2015] 7 MLJ 763 has categorically held that the Attorney General enjoys no absolute immunity from suit for malicious prosecution.

[13] The first defendant has not provided any cogent reason to depart from these authorities. On the contrary, this court finds the detailed reasoning in these judgments, drawing from developments in other Commonwealth jurisdictions, highly persuasive. Prosecutorial immunity cannot be absolute and must yield in exceptional cases where prosecutorial power has been abused for improper motives. To hold otherwise would place the Attorney General completely above the law. As such, this court holds that claims for malicious prosecution and misfeasance in public office can lie against the Attorney General in appropriate cases and it is not a legal position contrary to art. 145(3) of the FC.

[14] In the arguments, the first defendant had strongly contended that prosecutorial discretion under art. 145(3) of the FC is non-justiciable, meaning it is beyond the purview of the courts to review. This argument draws from a long line of authorities like *Long Samat & Ors v. PP* [1974] CLJU 80; [1974] 1 LNS 80; [1974] 2 MLJ 152, *Johnson Tan Han Seng v. PP & Other Appeals* [1977] CLJU 38; [1977] 1 LNS 38; [1977] 2 MLJ 66, and *Peguam Negara Malaysia v. Chin Chee Kow & Another Appeal* [2019] 4 CLJ 561; [2019] 4 MLJ 203, which have held that the Attorney General's discretion is absolute and not subject to judicial interference.

[15] However, this position must now be re-evaluated in light of the Federal Court's groundbreaking decision in *Sundra Rajoo* (*supra*). There, the apex court held that while art. 145(3) of the FC confers wide discretion, it does not make the Attorney General completely immune from judicial review. In appropriate cases, the courts can review the exercise of prosecutorial discretion on established grounds like illegality, irrationality and procedural impropriety. Significantly, the court recognised bad faith or *mala fide* as one of the grounds for judicial review of prosecutorial discretion. This aligns with the fundamental principle that power must not be abused, and that discretion, however broad, can never be unfettered under a system of constitutional supremacy. As Raja Azlan Shah J (as His Lordship then was) memorably stated in *Pengarah Tanah Dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd* [1978] CLJU 143; [1978] 1 LNS 143; [1979] 1 MLJ 135:

> ... every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene.

[16] Seen in this light, the non-justiciability argument no longer presents an insurmountable hurdle. If prosecutorial discretion can be reviewed on the grounds of bad faith, there is no reason in principle why a civil claim founded on malice cannot be maintained. The law must provide a remedy where legal

wrongs are committed, even by the highest legal officer. To hold otherwise would enshrine a most repugnant form of double standards. Lord Denning's famous aphorism in *Gouriet v. Union Of Post Office Workers* [1977] 1 QB 729 is applicable here:

> *... be you ever so high, the law is above you. It is no defence for a person to say: 'I am the Attorney-General and the courts cannot make a declaration against me' ... If he does not act in accordance with the law, the courts can say so ... If he does not act properly and lawfully, the courts can make a declaration to that effect ...* (emphasis added)

[17] While the first defendant relied on this case to argue for non-justiciability, the quoted passage actually supports the vital point that the Attorney General is not above the law. Where the Attorney General has demonstrably not acted "properly and lawfully", the courts have a duty to say so. That duty cannot be diluted or abdicated on an expansive notion of non-justiciability. Ultimately, the question is not whether prosecutorial discretion is totally immune from review, but whether the plaintiff has established a *prima facie* case of abuse deserving of a full inquiry. As elaborated in this judgment, this court is satisfied that the plaintiff has crossed that threshold through its pleadings and also affidavit evidence. See *Letchumanan Chettiar Alagappan (As Executor To SL Alameloo Achi (Deceased)) & Anor v. Secure Plantation Sdn Bhd* [2017] 5 CLJ 418; [2017] 4 MLJ 697.

[18] In such circumstances, it would be a dereliction of judicial duty to summarily scuttle the claim without a trial. The allegations are grave and troubling enough that public confidence would be undermined if they are not properly investigated. Striking out would be an affront to the constitutional imperative of upholding the rule of law without fear or favour.

Whether The Plaintiff Has Pleaded Sufficient Particulars

[19] The next issue is whether the plaintiff's pleadings disclose sufficient particulars to establish a reasonable cause of action. Upon examining the SoC, this court is satisfied that the essential elements for malicious prosecution have been properly particularised. The plaintiff has pleaded that the first defendant set the criminal law in motion against him by consenting to the charge, that there was no reasonable or probable cause for the charge, that the first defendant was actuated by malice or improper purpose, that the proceedings terminated in the plaintiff's favour through an acquittal, and that the plaintiff suffered damage to his reputation.

[20] While the first defendant argued that these are bare allegations, the plaintiff has in fact pleaded specific particulars, including the first defendant's statements showing political bias in his autobiography, his supposedly interference with MACC investigations despite being informed there was no

A wrongdoing, his failure to ensure complete investigation papers before charging, and the startling revelations by prosecution witnesses during trial that demolished the basis for the charge. These are not mere assertions, but detailed factual averments pleaded.

B **[21]** It must be emphasised here that whether the plaintiff will be successful in establishing his claim on a balance of probabilities is for this court to determine after trial. When all the evidence is adduced, this court then will make the findings. At this juncture, it is not for this court to decide the strength of the plaintiff's suit, it is sufficient that the facts contended to fulfill the ingredients of the cause of action are pleaded.

C **[22]** The particulars pleaded for misfeasance are likewise sufficient. The tort of misfeasance, aimed at preventing abuse of public power, requires establishing that a public officer acted with targeted malice or reckless indifference in abusing his power. The plaintiff's pleadings, particularising the purported first defendant's improper motives, deliberate failure to D scrutinise the investigation, and hasty decision to charge despite incomplete papers, amply establish a reasonable cause of action for misfeasance in public office.

[23] Given that malice is the central thread connecting these causes of E action, the various specific particulars pleaded by the plaintiff cumulatively raised a serious *prima facie* case of abuse of power warranting a trial. At the very least, they cannot be said to be obviously unsustainable to justify a striking out at this stage.

[24] Thus, having first considered the first defendant's application to strike F out under limb r. 19(1)(a) of the RoC, which is the assessment of the pleadings, this court is not satisfied that the plaintiff's claim ought to be struck out summarily.

Whether There Are Conflicts Of Material Evidence

G **[25]** Finally, even if there is doubt about the adequacy of the pleadings, the present application must fail due to clear conflicts on material facts and evidence. It is trite that a striking out application should not be allowed, where there are factual conflicts that require a trial for determination. Here, the affidavit evidence revealed obvious conflicts on key issues like the first defendant's alleged pressuring of MACC investigations, the incomplete state H of the investigation papers, and the plaintiff's information to the authorities that the RM1,000,000 was a reimbursement. The first defendant has largely made bare denials without properly addressing or refuting the plaintiff's specific averments.

I **[26]** Critically, the first defendant has not adequately responded to the shocking testimonies of prosecution witnesses SP21 and SP22 in the prosecution trial against the plaintiff. The plaintiff contended that this

exposed the flaws and improper basis for the charge against him. These testimonies, given on oath in open court, cannot be brushed aside and deserve to be tested by cross-examination. Given the centrality of this evidence, it would be highly prejudicial to deny the plaintiff the opportunity to establish his claim through *viva voce* evidence at trial.

[27] The book published by the first defendant, titled 'My Story – Justice in the Wilderness' greatly featured in this case. It plays a significant role in the plaintiff's contention of malicious prosecution. The plaintiff has relied on several statements and admissions made by the first defendant in the book to establish a *prima facie* case of improper motives and bad faith in the prosecution against him. Specifically, the plaintiff highlighted the following aspects from the book:

(i) the first defendant's admission that he remained a 'political lawyer' throughout his career – the plaintiff suggested a lack of impartiality.

(ii) the first defendant's account of how he lobbied various political and legal figures to be appointed as Attorney General – the plaintiff viewed it as an indication of a political agenda.

(iii) the first defendant's acknowledgment of his role in the efforts to topple the Barisan Nasional Government, which the plaintiff was a part of, the plaintiff maintained revealed a potential bias of the first defendant against the plaintiff.

(iv) most critically, the first defendant's statements about pressuring the MACC to investigate the plaintiff's role in FELDA and FELCRA for purported wrongdoings, even after being told there was no evidence of any scandal. This suggests a targeted and predetermined effort to find wrongdoing by the plaintiff.

[28] These published statements, made by the first defendant himself for public consumption, lend substantial credence to the plaintiff's claim of malicious prosecution. The plaintiff in his pleadings painted a picture of an Attorney General who was not objective and neutral, but one who was actively seeking to uncover wrongdoing by political opponents through the use of prosecutorial power. On the surface, the first defendant's own words in the book gave context and meaning to his subsequent actions in charging the plaintiff despite incomplete investigations. They supported the inference that the prosecution was not driven by the merits of the case, but by extraneous political considerations and a desire to tarnish the plaintiff. This squarely fits the legal definition of malicious prosecution – the abuse of the criminal process for purposes other than the proper administration of justice. It is well-established that proof of malice need not be direct, but can be inferred from all the circumstances pointing to the misuse of prosecutorial power. As stated in *Mahan Singh Karam Singh v. Chanan Singh Sher Singh* [1956] 1 WLR 781:

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> ... malice in the widest and vaguest sense ... is proved if the prosecution was instituted for some other and improper motive and not to secure the ends of justice.

[29] The first defendant's own admissions in his book constitute *prima facie* evidence of such improper motives. The fact that these statements were
B voluntarily published by the first defendant himself significantly bolsters their reliability and weight in supporting a finding of malice. At the very least, they raise grave questions about the integrity of the prosecution that cry out for a full and fair hearing. Shutting out such evidence without subjecting it to the acid test of cross-examination would be a severe miscarriage of
C justice. As the High Court held in *Rosli Dahlan* (*supra*):

> ... the court is only concerned with whether facts are pleaded with sufficient particulars to give rise to such remedies and it would then have to go to trial for the plaintiff to establish his case.

[30] The first defendant's admissions in in the book, together with the
D troubling testimonies of the prosecution's own witnesses during trial, more than meet this threshold. They establish a *prima facie* case that the prosecution was tainted by bad faith and improper motives, rather than based on objective and complete investigations. It would be a travesty for the court to turn a blind eye to such weighty evidence and deny the plaintiff the
E opportunity to vindicate his claim at trial.

[31] This court acknowledges that our Attorney General must be in a position to carry out his constitutional obligations without the constant worry of looking over his shoulders for the reactive responses that blow onto his direction. However, in this exceptional instance, the first defendant's
F published statements in his book form a crucial plank of the plaintiff's case theory. They provide the clearest link between the alleged malice and the overt act of prosecution. The fact that this evidence comes from the first defendant's own pen makes it impossible to ignore or summarily discount. Seen holistically, they reinforce the case for allowing the claim to be
G ventilated at a full trial where the first defendant will have the opportunity to explain those statements and be tested by cross- examination. Only then can the truth be ascertained in accordance with the time-honoured adversarial process that is the hallmark of our justice system.

Conclusion

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[32] For the above reasons, this court finds that the plaintiff's claim is not suitable for a striking out under any of the limbs of O. 18 r. 19(1). The claim is not obviously unsustainable, vexatious or an abuse of process. On the contrary, based on the pleadings and affidavit evidence, it discloses a reasonable cause of action that plainly deserves to be tried.

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[33] Our legal system, founded on the rule of law, requires that no one be placed above the law, not even the Attorney General. The recent apex court decision in *Sundra Rajoo* (*supra*) recognising that prosecutorial discretion is not unfettered reaffirms this sacred constitutional principle. Where credible allegations are raised that such discretion has been abused for improper motives, the aggrieved accused must be given an opportunity to prove his case in accordance with the law.

[34] The facts and circumstances of how the plaintiff came to be charged and then acquitted are troubling and cry out for investigation. The evidence reveals unsettling suggestions of hasty and selective prosecution without proper basis. Public confidence in the administration of justice would be undermined if such serious averments are shut out without being ventilated through the curial process. In conclusion, the balance of justice and the wider public interest mandate that this case be allowed to proceed. The first defendant's application is therefore dismissed. Costs will be in the cause. The plaintiff shall be given his day in court to prove his claim as he is entitled to under the law.